

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.**

**IN THE MATTER OF COMPLIANCE
WITH FEDERAL OBLIGATIONS BY THE
NAPLES AIRPORT AUTHORITY,
NAPLES, FLORIDA**

FAA Order No. 2003-1
(Part 16, Subpart G)

FAA Docket No. 16-01-15; DMS No. FAA-2000-15654

Served: August 25, 2003

FINAL AGENCY DECISION AND ORDER

Introduction

The City of Naples Airport Authority (NAA) prohibited Stage 2 aircraft flights at Naples Airport. After conducting an investigation, FAA's Director of Airport Safety and Standards, David Bennett, issued his determination¹ on March 10, 2003, concluding that Federal law preempts the Stage 2 ban at Naples Airport. He determined further that the ban was inconsistent with 49 U.S.C. § 47107(a)(1)² and Grant Assurance No. 22,³ both of

Under 14 C.F.R. § 16.105.

² It is provided in 49 U.S.C. § 47107(a)(1):

(a) General Written Assurances – The Administrator of the Federal Aviation Administration may approve a project grant application under this subchapter for an airport development project only if the Administrator receives written assurances, satisfactory to the Administrator that

(1) the airport will be available for public use on *reasonable conditions* and *without unjust discrimination*.

(Emphasis added.)

³ Grant Assurance No. 22, "entitled 'economic nondiscrimination' implements 49 U.S.C. § 47107(a)(1)-(6), and provides that a Federally-obligated airport sponsor "will make its airport available as an airport for public use on reasonable terms and without unjust discrimination, to all types, kinds and classes of aeronautical users." (Bennett Direct at 7.)

which require that an airport that receives Federal grants be available for public use on reasonable conditions and without unjust discrimination. As a result of the determination, the Director ordered that until NAA rescinds or takes formal action to stop the enforcement of the ban, the FAA would withhold approval of any applications submitted by NAA for funds apportioned under 49 U.S.C. §§ 47114(c) and (d) and any application for discretionary grants authorized under 49 U.S.C. § 47115.

On March 31, 2003, NAA filed a request for a hearing to review the Director's Determination. Subsequently, the FAA Deputy Chief Counsel issued a hearing order under 14 C.F.R. § 16.201, directing the designated hearing officer, Perry A. Kupietz, to address the following issues:

1. Whether the NAA has a proprietary interest in reducing noise from aircraft using the airport sufficient to bring the Stage 2 ban within the scope of the proprietary powers exception to Federal preemption, such that the Stage 2 ban is not preempted by Federal law.
2. Whether the NAA's ban on Stage 2 aircraft is consistent with its statutory and contractual obligation to make its airport available for public use on reasonable terms to all types, kinds, and classes of aeronautical activities.
3. Whether the NAA's ban on Stage 2 aircraft is consistent with its statutory and contractual obligation to make its airport available for public use without unjust discrimination to all types, kinds, and classes of aeronautical activities.
4. Whether the Airport Noise and Capacity Act of 1990 (ANCA), 49 U.S.C. § 47521, *et seq.*, affects the applicability of the statutory and contractual grant assurance obligations under 49 U.S.C. § 47107(a)(1) and Grant Assurance No. 22 to the NAA's Stage 2 ban.
5. Whether National Business Aviation Association v. City of Naples Airport Authority, 162 F. Supp. 2d 1343 (M.D. Fla. 2001) is binding on the FAA in its administrative adjudication of the issues related to the Stage 2 ban in its Notice of Investigation.⁴

⁴ The court held in this case that: 1) NAA could base the ban on Stage 2 aircraft on a noise contour below DNL 65 dB; 2) the Aviation Safety and Noise Abatement Act (ASNA) and the ANCA and their respective implementing regulations (14 C.F.R. Parts 150 and 161) did not preempt NAA's authority to consider noise levels below DNL 65 dB as the basis for the access

A hearing in this matter was held in Tampa, Florida, from June 3 through June 9, 2003, under 14 C.F.R. Part 16, Subpart F. On June 30, 2003, the Hearing Officer issued the initial decision, affirming in part and reversing in part the Director's Determination. The Hearing Officer resolved the five questions presented in the Deputy Chief Counsel's Hearing Order as follows⁵:

- 1 The proprietary powers exception to Federal preemption does not require evidence of actual or potential liability due to excessive aircraft noise. Accordingly, the Stage 2 ban is not preempted by Federal law.
- 2 The ban is not consistent with NAA's statutory and contractual obligations under 49 U.S.C. § 47107(a)(1) and Grant Assurance No. 22 respectively to make its airport available for public use on reasonable terms to all types, kinds, and classes of aeronautical activities.
- 3 The ban is consistent with NAA's statutory and contractual obligations under 49 U.S.C. § 47107(a)(1) and Grant Assurance No. 22 respectively to make its airport available for public use without unjust discrimination to all types, kinds, and classes of aeronautical activities.
- 4 The ANCA, 49 U.S.C. § 47521, *et seq.*, does not affect the applicability of the statutory and contractual grant assurance obligations under 49 U.S.C. § 47107(a)(1) and Grant Assurance No. 22 to NAA's ban of Stage 2 aircraft.
- 5 The holding of the court in National Business Aviation Association v. City of Naples Airport Authority, 162 F. Supp. 2d 1343 (M.D. Fla. 2001) is not binding on the FAA in its administrative adjudication of the issues related to the Stage 2 ban raised in the Notice of Investigation.

Both parties appealed from the Hearing Officer's decision. NAA is challenging the Hearing Officer's findings that 1) the Nation Business Aviation Association case is not binding on the FAA; 2) ANCA does not affect the applicability of the grant assurances; and 3) the Stage 2 ban is unreasonable and therefore is contrary to 49 U.S.C.

restriction; and 3) the access restriction did not violate the Commerce Clause. National Business Aviation Ass'n v. Naples Airport Auth., 162 F. Supp. 2d. 1343 (M.D. Fla. 2001).

⁵ The Hearing Officer's findings have been rearranged to be in the order that they answer the questions posed by the Deputy Chief Counsel in the Hearing Order.

§ 47107(a)(1) and Grant Assurance No. 22. NAA also has presented some additional arguments in its appeal.

In its appeal brief, the FAA Office of Airport Safety and Standards (AAS) challenges only the Hearing Officer's determination that the Stage 2 ban was not preempted under the proprietary powers exception. AAS, however, argues in its appeal brief that the Associate Administrator should not reach the preemption issue unless she reverses the Hearing Officer's decision that the Stage 2 ban is unreasonable.⁶

After reviewing the record and the briefs filed by the parties, it is held that:

- 1) the National Business Aviation Association case is not binding on the FAA in its resolution of the issues raised in the Notice of Investigation;
- 2) ANCA does not supercede 49 U.S.C. § 47107(a)(1) and Grant Assurance No. 22 regarding Stage 2 restrictions; and
- 3) the Stage 2 ban is unreasonable, and therefore contrary to NAA's obligations under 49 U.S.C. § 47107(a)(1) and Grant Assurance No. 22, because it was not proven that noncompatible land uses exist in the DNL 60 dB contour.

In light of these findings, it is not necessary to reach the issue of whether Federal law preempts NAA's Stage 2 ban.⁷

⁶ The AAS is not appealing the finding that the Stage 2 ban was not discriminatory.

⁷ The Supreme Court has held on numerous occasions that "[a] fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." Lying v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988). As the Supreme Court stated in another case, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 104 (1944). In light of this fundamental principle, the issue of whether Federal law preempts NAA from issuing the Stage 2 ban – a constitutional law issue – will not be decided here because resolution of the issue is not necessary.

Statutory and Regulatory Background

I. Aviation Safety and Noise Abatement Act of 1979 (ASNA), P.L. 96-193

(49 U.S.C. App. § 2101 *et seq.*, codified at 49 U.S.C. § 47501 *et seq.*)

In 1979, Congress enacted the Aviation Safety and Noise Abatement Act (ASNA). Congress enacted the ASNA “to support Federal efforts to reduce noise and to encourage compatible land uses around civil airports in the United States. . . because residential development adjacent to an airport may greatly restrict the usefulness of Federal funding at the airport.” (Bennett Direct at 9.) Congress directed the FAA to issue regulations to: 1) establish a single system of measuring noise; 2) establish a single system for determining the exposure of individuals to noise; and 3) identify land uses that normally are compatible with various exposures of individuals to noise. 49 U.S.C. § 47502. Under ASNA, any airport operator may submit a noise exposure map showing any noncompatible land uses surrounding the airport on the date of the map’s submission, and a noise compatibility program describing the measures that the operator has taken or proposes to take to reduce existing noncompatible uses and to prevent the introduction of additional noncompatible uses. 49 U.S.C. §§ 47503(a) and 47504(a). The ASNA authorized the operators to: (1) implement a preferential runway system; (2) restrict the use of the airport by any type or class of aircraft based on the aircraft’s noise characteristics; (3) construct barriers and acoustical shielding, including soundproofing; (4) use flight procedures to control the operation of aircraft to reduce exposure of individuals to noise in the area surrounding the airport; (5) acquire land and interests such as air rights, easements, and development rights, to assure the use of property for purposes compatible with airport operations. 49 U.S.C. § 47504(a)(2). The

Administrator must approve a noise compatibility program if, among other things, the proposed plan “is reasonably consistent with achieving the goal of reducing noncompatible uses and preventing the introduction of additional noncompatible uses.” 49 U.S.C. § 47504(b)(1)(B).

14 C.F.R. Part 150, “Airport Noise Compatibility Planning”

The FAA issued interim rules at 14 C.F.R. Part 150 in 1981 to implement portions of Title I of the ASNA. 46 Fed. Reg. 8316 (January 26, 1981). Part 150 prescribes requirements for airport operators who choose to develop airport planning compatibility programs and establishes a single system of measuring airport noise and a single system for determining the exposure of individuals to airport noise.⁸ The final rule was published on December 18, 1984. 49 Fed. Reg. 49260 (December 18, 1984.)

Appendix A of Part 150 establishes a uniform methodology for developing and preparing airport noise exposure maps. Noise exposure maps must include continuous contours for yearly day-night average sound levels (YDNL) levels of 65, 70 and 75 dB. Airport proprietors must identify the land uses in the contours with YDNL 65 dB or above, and determine whether those land uses are compatible with those noise levels. Appendix A, Sec. A150.101(a).

⁸ Section 150.9 provides as follows:

For purposes of this part, the following designations apply:

- (a) The noise at an airport and surrounding areas covered by a noise exposure map must be measured in A-weighted sound pressure level ... in units of decibels (dBA) in accordance with the specifications and methods prescribed under appendix A of this part.
- (b) The exposure of individuals to noise resulting from the operation of an airport must be established in terms of yearly day-night average sound level (YDNL) calculated in accordance with the specifications and methods prescribed under appendix A of this part.

14 C.F.R. § 150.9(a).

Regarding land use compatibility, the FAA determined for purposes of Part 150 that “all land uses are considered to be compatible with noise levels less than L_{dn} ⁹ 65 dB” while noting that “local needs or values may dictate further delineation based on local requirements or determinations.”¹⁰ Part 150, Appendix A, Sec. A150.101(d). In Table 1, the FAA described in greater detail what land uses are compatible or incompatible with various yearly day-night average sound levels. It is stated in Table 1 that residential land uses are compatible with YDNL below 65 and incompatible with YDNL above 65.¹¹ The following statement appears beneath Table 1:

The designations contained in this table do not constitute a Federal determination that any use of land covered by the program is acceptable or unacceptable under Federal, State, or local law. *The responsibility for determining the acceptable and permissible land uses and the relationship between specific properties and specific noise contours rests with the local authorities. FAA determinations under part 150 are not intended to substitute federal determined land uses for those determined to be appropriate by local authorities in response to locally determined needs and values in achieving noise compatible land uses.*

(Emphasis added.)

⁹ L_{dn} is the symbol for day-night average sound level (DNL). DNL “means the 24-hour average sound level in decibels, for the period from midnight to midnight, obtained after the addition of ten decibels to sound levels for the period between midnight and 7 a.m. and between 10 p.m. and midnight, local time.” 14 C.F.R. § 150.7 (definition of day-night average sound level).

¹⁰ As stated in the preamble to the interim rules:

By identifying “normally compatible land uses, Part 150 does not usurp or preempt the authority and responsibility of State and local authorities to exercise their police powers with respect to the development and implementation of local land use policy.

46 Fed. Reg. at 8317.

¹¹ The FAA based this determination upon the findings of the Federal Interagency Committee on Urban Noise (FICUN), which was formed in 1979 to develop Federal policy and guidance on noise. In its 1980 report, the FICUN found that standard residential construction was compatible with noise exposure from all sources up to DNL 65 dB. (Connor Direct at 4.)

The noise exposure map must identify each noncompatible land use¹² in each area on the map as of the date of submission to the FAA. 14 C.F.R. § 150.21(a). The airport operator also should submit another map indicating noise exposures based on forecast aircraft operations for the fifth calendar year after the date of submission. 14 C.F.R. § 150.21(a)(1). When developing these maps, the airport operator must consult with state and local agencies with jurisdiction over the areas within the DNL 65dB contour, FAA officials, and aeronautical users of the airport. 14 C.F.R. § 150.21(b).

Once the FAA approves the submitted noise exposure maps, the airport operator may submit a noise compatibility program. 14 C.F.R. § 150.23(a).¹³ A noise compatibility program must include a description and analysis of the alternative measures that the airport operator considered, an explanation regarding the reasons that the airport operator rejected any measures, and a description of the measures that the airport operator proposes to adopt to reduce or eliminate present and future noncompatible land uses. 14 C.F.R. §§ 150.23(e)(2) and (3). When preparing the program, the airport operator must consult with local, state and Federal agencies, as well as airport users. 14 C.F.R. § 150.23(b). The FAA's evaluation of a noise compatibility program must include a determination of whether the proposed measures are reasonably consistent with the goal

¹² Noncompatible land use is defined as a "use of land that is identified under [Part 150] as normally not compatible with the outdoor noise environment (or an adequately attenuated noise reduction level for the indoor activities involved at the location) because the yearly day-night average sound level is above that identified for that or similar use under appendix A (Table I) of [Part 150]." 14 C.F.R. § 150.7 (definition of noncompatible land use).

¹³ A noise compatibility program includes the actions proposed or taken by the airport operator to reduce existing noncompatible land uses and to prevent the introduction of additional noncompatible land uses within the area covered by the noise exposure map. 14 C.F.R. § 150.7 (definition of airport noise compatibility program); 14 C.F.R. Part 150, App. B, Sec. B150.1(a).

of reducing existing noncompatible land uses and preventing the introduction of additional noncompatible land uses. 14 C.F.R. § 150.33(a).¹⁴

III. Airport and Airway Improvement Act of 1982 (AAIA), Title V of P.L. 97-248
(49 U.S.C. App. § 2201 *et seq.*; codified at 49 U.S.C. § 47101 *et seq.*)

In 1982, Congress passed the Airport and Airway Improvement Act (AAIA), establishing the Airport Improvement Program and authorizing the FAA to make grants for airport development. Congress provided that the Administrator “may approve a project grant application ... for an airport development project only if the Administrator receives written assurances ... that (1) the airport will be available for public use on reasonable conditions and without unjust discrimination.” 49 U.S.C. § 47107(a)(1).^{15 16}

Grant assurance obligations remain in effect throughout the useful life of the facilities funded with grant money, but not more than 20 years. FAA Order No. 5190.6A, § 2-2a.

¹⁴ See also 14 C.F.R. § 150.35(b)(1), which provides that the: “Administrator approves programs under this part if –

(1) It is found that the program measures to be implemented would not create an undue burden on interstate or foreign commerce (including any unjust discrimination) and are reasonably consistent with achieving the goals of reducing existing noncompatible land uses around the airport and of preventing the introduction of additional noncompatible land uses[.]

14 C.F.R. § 150.35(b).

¹⁵ For the other written assurances required by Congress, see the full text of 49 U.S.C. § 47107.

¹⁶ The Director of AAS explained in his determination:

The FAA ensures that airport owners comply with their Federal grant obligations through the FAA’s Airport Compliance Program. The program is based on the contractual obligations, which an airport owner accepts when receiving Federal grant funds[.] The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public use airports operated in a manner consistent with the airport owners’ Federal obligations and the public’s investment in civil aviation. The Airport Compliance Program ... monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants ... to ensure that the public interest is being served.

(DD at 12.)

IV. Airport Noise and Capacity Act of 1990 (ANCA), Title IX, Subtitle D of

P.L. 101-508 (49 U.S.C. App. § 2151 *et seq.*, codified at 49 U.S.C. § 47521 *et seq.*)

In 1990, Congress passed the Airport Noise and Capacity Act of 1990 (ANCA).

The authors included the following findings as the basis for the ANCA

- (1) aviation noise management is crucial to the continued increase in airport capacity;
- (2) community noise concerns have led to uncoordinated and inconsistent restrictions on aviation which could impede the national air transportation system;
- (3) a noise policy must be implemented at the national level;
- (4) local interest in aviation noise management shall be considered in determining the national interest[.]

49 U.S.C. § 47521. Among other things, the ANCA provides that after

December 19, 1999, a person may operate to or from any United States airport any civil subsonic turbojet weighing more than 75,000 pounds if that aircraft complies with the Stage 3 noise levels. 49 U.S.C. § 47528(a). ANCA required the FAA to issue regulations establishing a national aviation noise policy, “including the phaseout and nonaddition of Stage 2 aircraft.” 49 U.S.C. § 47523(a).¹⁷ Congress directed that the national aviation policy would include regulations for reviewing airport noise and airport access restrictions on Stage 2 and Stage 3 aircraft operations.¹⁸ Regarding restrictions on airport access for Stage 2 aircraft, ANCA provides at 49 U.S.C. § 47524(b):¹⁹

¹⁷ In September 1991, the FAA issued a final rule to phase out operations of Stage 2 aircraft weighing more than 75,000 pounds. 56 Fed. Reg. 48628 (September 25, 1991).

¹⁸ Generally, Stage 1 airplanes are the loudest, Stage 2 airplanes are in the middle, and Stage 3 airplanes are the quietest. See 14 C.F.R. Part 36 for an explanation of the certification criteria for Stage 1, 2, and 3 aircraft.

¹⁹ Subsection (c)(2) of Section 47524 requires FAA approval of Stage 3 aircraft restrictions. Subsection (c)(2)(A) requires that the Administrator shall not approve of any Stage 3 aircraft access restriction unless he finds that the proposed restriction is, among other things, reasonable, nonarbitrary and nondiscriminatory and does not create an undue burden on interstate or foreign

Stage 2 aircraft. – [A]n airport noise or access restriction may include a restriction on the operation of stage 2 aircraft ... only if the airport operator publishes the proposed restriction and prepares and makes available for public comment at least 180 days before the effective date of the proposed restriction –

- (1) an analysis of the anticipated or actual costs and benefits of the existing or proposed restriction;
- (2) a description of alternative restrictions;
- (3) a description of the alternative measures considered that do not involve aircraft restrictions; and
- (4) a comparison of the costs and benefits of the alternative measures to the costs and benefits of the proposed restriction.

V. 14 C.F.R. Part 161, “Notice and Approval of Airport Noise and Access

Restrictions”

The Administrator issued a final rule on September 25, 1991, to implement the ANCA’s directive that the FAA develop a program for reviewing airport noise and access restrictions for Stages 2 and 3 aircraft. 56 Fed. Reg. 48661 (September 25, 1991).

Part 161 includes “analysis and notice requirements for airport operators proposing Stage 2 aircraft noise and access restrictions.” 14 C.F.R. § 161.1(b). Under Section 161.203(a), an airport operator may not implement a Stage 2 restriction unless the operator provides an analysis of the proposed restriction and public notice and opportunity for comment. 14 C.F.R. § 161.203(a).

commerce. 49 U.S.C. § 47524(c)(2)(A). There is no specific comparable provision in ANCA for FAA approval of Stage 2 restrictions that are reasonable, nonarbitrary and nondiscriminatory.

Statement of the Facts and the Case

Naples Municipal Airport (APF), built in 1941,²⁰ is a public-use airport, located about 20 minutes away from the center of the City of Naples, Florida. (DD, Item 2, Attachment 3, at 1.) It is located on 732 acres of land and has two runways. (Vasconcelos Direct at 7.) The airport has over 138,000 operations annually, and prior to the implementation of the Stage 2 ban, there were approximately 900 Stage 2 aircraft operations per year at Naples. (Vasconcelos Direct at 7 and 12.) As a result of the shortness of the runways and the limited runway pavement strength, the airport cannot accommodate large commercial jets.²¹

The City of Naples owns the airport property and leases it to NAA to operate the airport.²² NAA is a separate public entity created by the Florida State legislature to operate the airport. NAA is independent of the City of Naples, although NAA's Board members are appointed by the City Council.²³

The City of Naples is, as NAA's executive director described it, a "desirable retirement and vacation community" due to its mild climate and outdoor activities. (Soliday Direct at 4.) The City of Naples borders on the Gulf of Mexico. (Tr. 539.) The City of Naples is in Collier County, Florida.

²⁰ (Soliday Direct at 2.)

²¹ Large commercial jets and most air carrier service to this area fly in and out of such neighboring airports as Southwest Florida International Airport in Fort Myers, which is about 28 miles away. (Soliday Direct at 3.)

²² (Soliday Direct at 2.) The City of Naples transferred the airport operational and management powers to NAA under lease for 99 years NAA. (Vasconcelos Direct at 7.)

²³ (Soliday Direct at 2.)

The FAA granted funds to NAA for planning and development under the Airport Improvement Program (AIP). (DD, Item 1 at 2.) Between 1982 and October 2001 (when the FAA issued the Notice of Investigation), the airport received \$14,617,978 in Federal airport development assistance. (DD, Item 1 at 2.) When NAA agreed to accept these funds, it gave binding commitments in the form of grant assurances regarding the use, operation and maintenance of the airport. (Bennett Direct at 4.)

In 1996, the City of Naples revised its “Special Overlay District” to include all areas exposed to noise in excess of DNL 60 dB. Proposed development projects within the Special Overlay District are subject to review. (MacKenzie Direct at 6.)

In September, 1997, the FAA approved the Naples Airport’s Noise Compatibility Plan Update.²⁴ The FAA approved NAA’s adoption of the DNL 65 dB contour “as the threshold of incompatibility for residential areas.” The FAA found that it was within the authority of the local land use planning jurisdictions, for zoning and land use planning purposes, to apply to the area within the DNL 60 dB noise contour “the same standards as Part 150 recommends for the DNL 65 dB noise contour as a buffer to ensure that

²⁴ In NAA’s Part 150 study for its the Revised Compatibility Program for 1996, it was noted that there were no incompatible land uses in the DNL 65 dB contour in the revised 2001 noise exposure map. The authors then recommended creating a buffer zone of compatible land use around that contour as a preventive measure. The study stated:

However, it is important to create a buffer of compatible land use around the airport. As such, another standard should be designated by the local land use planning agencies to ensure that residential and noise sensitive uses are not developed too close to the Airport. One possible standard is the 60 L_{dn} contour. Figure 5-2 depicts the 60 L_{dn} contour for the revised NEM including the noise abatement measures. Applying the land use compatibility guidelines normally used for the 65 L_{dn} contour to this 60 L_{dn} contour should create an adequate area of compatible land use.

(DD, Item 2, Attachment 28, at 5-11.)

residential and noise sensitive uses are not developed too close to the Airport.” (DD, Item 2, Attachment 29, section 7.3.3.)²⁵

On January 21, 1998, the Naples City Council adopted Future Land Use Element 33 through Ordinance No. 98-8165. The ordinance provides that land outside of the airport site and located within the DNL 60 dB contour shall require General Development Site Plan approval by the City Council.²⁶ (MacKenzie Direct at 4; Soliday Direct at 4.) In June 2000, Collier County imposed the same land use restrictions (notification and sound level reduction) for all new residential construction or redevelopment in the DNL 60 dB contour as were required in the DNL 65 dB contour. (Soliday Direct at 11.)²⁷

On June 22, 2000, NAA passed Resolution No. 2000-7, explaining that NAA’s consultants, based on a Part 161 study, recommended that NAA implement a 24-hour ban

²⁵ Miguel Vasconcelos, in his written testimony, explained:

Through an earlier Part 150 study, the FAA had approved the DNL 60 dB as a buffer, and as a buffer only, meaning that no restrictive element in the 1997 NCP [Noise Compatibility Program] was directly tied to this buffer. So, as far as I was concerned, there was logic in using the DNL 60 dB as a protective area in conjunction with the DNL 65 dB. As a buffer area, a local restriction on construction in the DNL 60 dB contour would prevent new construction in an area that could return to the DNL 65 dB contour at some point in the future, if operations at the airport substantially increased or in other unpredictable circumstances.

(Vasconcelos Direct at 17-18.)

²⁶ The Mayor testified that “[s]ince City policy was adopted setting the threshold of land use compatibility, the City has not granted any discretionary approvals for new residential development in areas exposed to noise in excess of the thresholds approved by City ordinance (MacKenzie at 8.)

²⁷ Since that time, “the County has been hugely successful in restricting incompatible land uses within the DNL 60 dB contour as evidenced by the complete absence of residential development in the area.” (Soliday Direct at 12.)

on operations by all Stage 2 aircraft.^{28 29} NAA announced that it was seeking public comment regarding its proposed ban of all Stage 2 operations to go into effect on January 1, 2001. (DD, Item 2, Attachment 2.)

In the Part 161 study, the consultants explained that the Stage 2 ban was based upon the land use compatibility determinations of the City of Naples and Collier County.

Airports are instructed to adopt compatibility criteria established by local jurisdictions. A 1998 City of Naples ordinance established 60 dB DNL as the limit for land use compatibility within municipal limits. Within 60 dB DNL, the City Council must provide general development site plan ("GDSP") approval. In addition, Collier County has adopted 60 dB DNL as the limit for noise-land use compatibility and has amended the county Land Development Code to require noise notices within that contour.

In compliance with the FAA Part 150 guidance that airport proprietors defer to local authorities in determining land use compatibility criteria,³⁰ the NAA respects the City of Naples and Collier County 60 dB DNL land use compatibility criteria and considers residential land within the 60 dB DNL contour to be incompatible with aircraft noise and has established the goal of minimizing residential land within 60 dB DNL to the maximum feasible extent.

²⁸ According to the consultant's report written in June 2000, a 24-hour restriction on Stage 2 jet operations would result in a 91% reduction in the present population residing in the DNL 60 dB contour, reducing the current population of 1,682 to 152 persons. The consultant also concluded that a 24-hour ban on Stage 2 jet operations would remain the most effective alternative in 2005. (DD, Item 2, Attachment 1.)

²⁹ According to the FAA, Stage 2 turbojet aircraft comprise 28% of the general aviation and air taxi jet fleet in the United States. There are approximately 2000 Stage 2 turbojet aircraft. There are also nonjet Stage 2 aircraft. (Vasconcelos Direct at 11-12.)

³⁰ Regarding this assertion, the Director of Airport Safety and Standards stated, "Part 150 does not 'direct' any such action, and certainly does not relieve the airport operator from the obligation to provide reasonable access under the federal grant assurances." (Bennett Direct at 16-17.)

(DD, Item 2, Attachment 3, at 16.)³¹ The study noted that Stage 2 jets are the principal source of noise impact causing community concern, generating 38 percent of all noise-related complaints, even though they represented less than one percent of all operations at the airport. (DD, Item 2, Attachment 3, at 1 and 91.) The study concluded that the non-restrictive measures that NAA had taken in the past were insufficient to achieve its land compatibility goal. (DD, Item 2, Attachment 3 at 28.) Based upon a cost-benefit analysis of three alternative measures – each involving an airport access restriction³² – the consultants recommended a 24-hour ban on Stage 2 jet aircraft. The consultants stated that a 24-hour prohibition against all of the relatively small number of Stage 2 aircraft flights would “reduce the population inside the 60 dB DNL contour from 1,682 to 152” (DD, Item 2, Attachment 3 at 91.)

On November 16, 2000, NAA passed and adopted Resolution 2000-8. In this resolution, NAA announced its determination to impose a 24-hour ban on operations by all Stage 2 aircraft, effective January 1, 2001 (DD, Item 2, Attachment 9.) On February 7, 2001, NAA passed and adopted Resolution 2001-2, explaining that it would defer enforcement of the ban while it engaged in discussions with the FAA about the ban and would prepare a supplemental analysis to address the FAA’s concerns. (DD, Item 2,

³¹ Similarly, NAA’s consultants stated in an introductory letter to the Part 161 study:
 In deference to established City of Naples and Collier County policies and regulations, the NAA adopted the goal of minimizing residential land use within the 60 decibel Day-Night Average Sound Level noise contour to the maximum feasible extent. The NAA has exhausted all reasonable non-restrictive measures to achieve this objective. Therefore, the NAA commissioned this consulting team to investigate benefits and costs of alternative new use restrictions that will assist in accomplishing its land use compatibility goal.
 (DD, Item 2, Attachment 3.)

³² The three alternatives examined in the Part 161 study were:
 1) a night-time ban from 10 p.m. to 7 a.m. on Stage 2 jet aircraft operations;
 2) a 24-hour restriction on Stage 2 jet aircraft operations; and
 3) a night time ban from 10 p.m. to 7 a.m. of all operations.

Attachment 12.) In Resolution 2001-4, the NAA's staff was directed to defer enforcement of the Stage 2 ban until July 21, 2001, or until further action by the Board. (DD, Item 2, Attachment 13.)

The National Business Aviation Association and the General Aviation Manufacturers Association filed a lawsuit against NAA in Federal district court, challenging the constitutionality of the Stage 2 ban. The parties filed cross-motions for summary judgment in June 2001. While these motions were pending, NAA passed Resolution 2001-6, extending the deferral of the ban's enforcement. (DD, Item 2, Attachment 14.) NAA noted in the resolution that if the district court ruled in its favor and upheld the ban, NAA would be authorized to enforce the ban. (*Id.*)

NAA's consultants completed a draft of the Part 161 Supplemental Analysis on June 23, 2001. The consultants explained that they had prepared this analysis to address concerns presented by the FAA. It was concluded in this supplemental study that the 24-hour restriction of Stage 2 flights would be less expensive and would produce a greater population reduction in the airport noise study area (ANSA) (within the DNL 60 dB contour) than any other alternative.

As they wrote in the earlier study, the consultants explained that in proposing the Stage 2 ban, NAA was deferring simply to the land use determinations made by the local jurisdictions regarding the incompatibility of residential use with noise levels exceeding DNL 60 dB. The consultants explained that Part 150's DNL 65 dB threshold is too high in light of the outdoors-oriented life-styles in Naples. They wrote:

During the winter season, residential population grows approximately 71% and Stage 2 jet operations are approximately 300% higher than in the off-peak. The increased activity comes at the same time as residents open their windows and spend time outdoors. The fact that the population and aircraft operations peak

during the months when the open-window, outdoor-focused lifestyle is most desirable, increases the justification for this local correction.

(DD, Item 2, Attachment 15 at 9.)

Responding to FAA's request for information about noise-related liability (as a justification for NAA's selection of the DNL 60 dB threshold), the consultants explained that there was no judicial determination of noise-related liability against NAA, and there were no pending lawsuits. Regardless, the consultants wrote, "NAA's action was based upon identifiable and credible threats of suit that cannot be discounted, in light of settlements and judgments regarding other airports around the country." (DD, Item 2, Attachment 15 at 11.)³³

The supplemental study also responded to the FAA's request for further documentation regarding development proposals submitted to local authorities since the City and County adopted the DNL 60 dB land use compatibility threshold and actions taken by the City and County governments to enforce that threshold. (DD, Item 2, Attachment 15 at 19-30. The supplemental study noted that there were 3 residential developments within the 2005 DNL 60 dB contour that were completed before the City or County adopted the DNL 60 dB land use compatibility standard: Rock Creek Mobile

³³ The consultants mentioned that NAA had received oral and written threats claiming damages for inverse condemnation from the owner of Rock Creek Campground, which lies within the DNL 60 dB contour and numerous informal complaints from other property owners located in areas exposed to noise at levels below DNL 65 dB. The consultants wrote, "Considering the multitude of lawsuits throughout the country involving noise-related claims for inverse condemnation (takings), nuisance, and trespass, the NAA believes it is possible that it may be sued by the Rock Creek Campground property owner and/or other property owners dissatisfied with noise from the Airport and aircraft overflights." (DD, Item 2, Attachment 15 at 13.) After analyzing the legal standards for inverse condemnation and nuisance claims in Florida, the consultants concluded that NAA faced a "credible risk of liability." (DD, Item 2, Attachment 15 at 13-14.)

Home Park, Naples Bay Club Condominiums, and Marina Manor. (DD, Item 2, Attachment 15 at 20.)

On February 7, 2001, the NAA passed Resolution 2001-8, implementing the Stage 2 ban.

On October 31, 2001, David L. Bennett, the Director of Airport Safety and Standards, issued a Notice of Investigation to the NAA under 14 C.F.R. Part 16, Subpart D, of the Rules of Practice for Federally Assisted Airport Proceedings. With the issuance of this Notice of Investigation, the FAA began its first formal investigation into the reasonableness and discriminatory nature of a noise-based aircraft access restriction since ANCA's enactment. (Bennett Direct at 7.)

The Director noted preliminarily in the Notice of Investigation that NAA had complied with the procedural requirements of Part 161, but that "compliance with the requirements of the grant obligations is a separate matter." (DD, Item 1, NOI at 1). The Director noted that while airport access restrictions are subject to the ANCA and Part 161, they are also subject to 49 U.S.C. § 47107(a)(1)'s and Grant Assurance No. 22's requirement that the airport be available for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities. (DD, Item 1, NOI at 3.) The Director stated that the prohibition against Stage 2 aircraft "may be inconsistent with NAA's obligation to provide reasonable and non-discriminatory access to the airport without granting exclusive rights." (DD, Item 1, NOI at 5.) The Director was also concerned about whether NAA had a proprietary interest in reducing noise from aircraft at the airport such that the Stage 2 ban was not preempted by Federal law. (DD, Item 1, NOI at 8.)

NAA filed its reply to the notice of investigation on December 3, 2001.

On March 10, 2003, the Director of the Office of Airport Safety and Standards issued his 96-page determination in this matter. The Director concluded that the Stage 2 ban conflicted with NAA's obligations under Grant Assurance No. 22 because the prohibition was unreasonable and discriminatory.

NAA requested a hearing on March 31, 2003, and the Deputy Chief Counsel issued a Hearing Order on April 10, 2003, in which he appointed a hearing officer and specified the issues to be resolved. (*See supra* at 2.)

A hearing was held on June 3-9, 2003.³⁴ The Hearing Officer issued his decision on June 30, 2003. (*See supra* at 3.)

DISCUSSION

I. Whether the Federal District Court Decision Upholding the Stage 2 Ban Binds the FAA

In National Business Aviation Association v. Naples Airport Authority, 162 F. Supp. 2d 1343 (M.D. Fla. 2001), two aviation trade groups sued NAA in Federal district court, claiming that the ban on Stage 2 aircraft violated the Supremacy Clause and the Commerce Clause. The FAA was not a party to the suit and did not participate in it. The district court ruled in NAA's favor on a motion for summary judgment.

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³⁴ In May 2003, the Hearing Officer approved the requests to participate by the National Business Aviation Association (NBAA), General Aviation Manufacturers Association (GAMA), Airport Council International-North America, Aircraft Owners and Pilots Association (AOPA), City of Naples, Collier County, Air Transport Association of America (ATA), and Regional Airline Association (RAA). He rejected petitions submitted by the National Organization to Insure a Sound-Controlled Environment (NOISE), Florida Airport Council, Quiet Technology Aerospace, Inc., Board of County Commissioners of Pitkin County, Colorado, City of Scottsdale, and Michael R. Wood.

In the instant case, NAA argued before the Hearing Officer that the district court decision binds the FAA under the doctrines of *res judicata*, collateral estoppel, and comity. The Hearing Officer held otherwise, and NAA has appealed this determination. This decision finds that the Hearing Officer's analysis was correct.

As the Hearing Officer found, *res judicata* or claim preclusion (the barring of claims from a previous case) does not apply because two critical elements are unmet.³⁵ First, the FAA was not a party to the previous case nor was it in privity with any of the parties. Second, the causes of action in the two cases are not the same.

The FAA was not in privity with the plaintiffs in the district court case because it did not have the control of a co-party over the litigation³⁶ and it did not have sufficient identity of interests with the plaintiffs.³⁷ While NAA argues that the FAA communicated regularly and coordinated closely with the plaintiffs in the earlier lawsuit, NAA's evidence supporting this claim is weak. NAA points to evidence in the record showing that the plaintiffs and the FAA met a month before the plaintiffs filed suit, but a single

³⁵ The elements of *res judicata* are as follows: (1) a court (of competent jurisdiction) has issued a final judgment on the merits; (2) the parties, or those in privity with them, are identical; and (3) the cause of action is the same in both cases. Allied Pilots Ass'n. v. Pension Benefit Guar. Corp., 2003 U.S. App. LEXIS 13898, *9 (D.C. Cir. July 11, 2003); Holland v. Nat'l Mining Ass'n, 309 F.3d 808, 813 (D.C. Cir. 2002); Citibank, N.A. v. Data Lease Financial Corp., 904 F.2d 1498, 1501 (11th Cir. 1990).

³⁶ In order for *res judicata* to apply, the nonparty must have had at least as much control as a formal co-party. 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4451 at 428 (2d ed. 1981) ("WRIGHT & MILLER").

³⁷ Privity is present when a nonparty's interests are so closely aligned to a party's interests that the party adequately represented the nonparty and the nonparty can be considered to have had his or her day in court. United States v. Perchitti, 955 F.2d 674, 676 (11th Cir. 1992); Jaffree v. Wallace, 837 F.2d 1461, 1456 (11th Cir. 1988); Ethnic Employees of Library of Congress v. Boorstin, 751 F.2d 1405, 1411 (D.C. Cir. 1985). Sometimes courts refer to this as "virtual representation." *Id.* Other courts, however, "have refused to adopt any general rule that a nonparty may be precluded from relitigating issues . . . lost after vigorous advocacy by a party who seems to hold interests identical to the interests of the nonparty." WRIGHT & MILLER, *supra*, § 4457 at 500.

meeting does not show regular communication or close coordination, and NAA has cited nothing in the record indicating the substance of the meeting.

NAA also argues that the timing of events speaks for itself, noting that the FAA

1. initiated an enforcement action against it under 14 C.F.R. Part 161 about the same time as the aviation trade groups filed suit in district court; and
2. issued a notice of investigation under 14 C.F.R. Part 16 shortly after the aviation trade groups withdrew their appeal from the district court's decision.

The timing alone, however, does not establish regular communication and close coordination.

Regarding whether the private litigants' interests and those of the FAA are aligned closely enough to support a finding of privity, the answer is no. The FAA's interests are far broader than those of the two aviation trade groups that were plaintiffs in the district court case. The first of these groups, the National Business Aviation Association, represents business aviation, a subset of general aviation, and said that it was suing on behalf of "at least one member." The General Aviation Manufacturing Association sued on behalf of suppliers of aircraft services for Stage 2 aircraft at Naples Airport.

As important as each group is, they are but two of numerous aviation trade groups, and aviation trade groups in turn are only one type of stakeholder whose interests the FAA must consider. Neither of the plaintiffs in the district court case has the overarching responsibility that the FAA does to serve the national public interest. The two aviation trade groups represented their own interests in the district court litigation, but could not have represented the FAA's. Thus, the FAA did not have its day in court

when the two groups sued NAA, and the Hearing Officer did not err in finding there was no privity.

Further, the FAA did not have a duty to intervene in the district court case. The courts have said that requiring the government to monitor all lawsuits and intervene would be too onerous a burden.³⁸ NAA could have brought in the FAA through joinder, but it failed to do so.³⁹

Res judicata also does not apply because the causes of action are not the same. The Supreme Court has said that unless the parties are the same, the causes of action by definition are not the same,⁴⁰ and the FAA was not a party to the district court case. Further, the causes of action are not the same because the district court case, unlike the instant case, did not involve the grant assurances.

As for collateral estoppel, or issue preclusion (the barring of issues from a previous case), the Hearing Officer correctly determined that it does not apply, first because none of the issues are identical. While the district court did decide the federal preemption issue, it did not consider whether the proprietor exception to federal preemption applied, which is the issue in the instant case. The other issues in the district

³⁸ “Congress never mandated that the government must intervene in each and every piece of litigation or forever be barred by the doctrine of *res judicata*.” Herman, 140 F.3d at 1426 (11th Cir. 1998), quoting Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 691 (7th Cir. 1986) (en banc).

³⁹ According to the Supreme Court, the burden is on a party to a lawsuit to bring in additional parties by means of joinder where appropriate, rather than on potential additional parties to intervene. Martin v. Wilks, 490 U.S. 755, 765 (1989).

⁴⁰ “[T]he cause of action which a nonparty has vicariously asserted differs *by definition* from that which he subsequently seeks to litigate in his own right.” Montana, 440 U.S. 147 at 154 (emphasis added).

court case are not identical to those in the instant case because they did not involve the grant assurances.

The other reason that collateral estoppel does not apply is that the FAA, which did not participate in the previous case, obviously did not have a full and fair opportunity to litigate the issues.⁴¹

Finally, the Hearing Officer correctly decided that the principle of comity *i.e.*, respecting another adjudicatory body by giving effect to its case law⁴² – does not require the FAA to follow the district court decision. Comity is only discretionary, not obligatory,⁴³ and important interests within the FAA’s jurisdiction are at stake.⁴⁴

II. Whether It Was Error For The Hearing Officer To Hold that ANCA Does Not Supersede 49 U.S.C. § 47107 and Grant Assurance No. 22

NAA has argued throughout these proceedings that ANCA supercedes an airport operator’s written assurances made when it accepted Federal Airport Improvement

⁴¹ Collateral estoppel or issue preclusion bars re-litigation of an issue if:
 (1) the issue at stake is identical to the one in the prior litigation;
 (2) the issue was actually litigated in the prior suit;
 (3) the determination of the issue in the prior litigation was a necessary part of the judgment in that litigation; and
 (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier litigation.

CSX Transportation, Inc. v. Brotherhood of Maintenance of Way Employees, 327 F.3d 1309, 1317 (11th Cir. 2003).

⁴² In re Bristol Res. 1994 Acquisition Ltd. P’ship, 2003 U.S. App. LEXIS 12288, *2 (5th Cir. June 19, 2003) (quoting Black’s Law Dictionary).

⁴³ Remington Rand Corp. v. Business Systems, 830 F.2d 1260, 1267 (3rd Cir. 1987).

⁴⁴ When important interests in the adjudicatory body’s own jurisdiction are at stake, “comity yields.” United States v. Gillock, 445 U.S. 360, 373 (1980), *quoted in* Federal Reserve Bank of Atlanta v. Thomas, 220 F.3d 1235, 1246 (11th Cir. 2000).

grants⁴⁵ under 49 U.S.C. § 47107(a)(1).⁴⁶ AAS, in contrast, has maintained that regarding Stage 2 access restrictions, an airport proprietor must follow ANCA's notice, analysis, and public comment requirements *and* demonstrate that the restriction is not contrary to the conditions in any applicable grant assurances (including the requirement that the airport would be open for public use on reasonable conditions). The Hearing Officer held in favor of AAS on this issue, and NAA has appealed that finding. This decision denies NAA's appeal and affirms the Hearing Officer's determination on this issue.

ANCA provides in 49 U.S.C. § 47524(b) that an airport operator may impose an access restriction on Stage 2 aircraft only if the airport operator publishes the proposed restriction and gives the public an opportunity to comment at least 180 days before the proposed restriction's effective date. Section 47524(b) specifies the type of information that must be contained in that notice: "(1) an analysis of the anticipated or actual costs and benefits of the existing or proposed restrictions; (2) a description of alternative restrictions; (3) a description of the alternative measures considered that do not involve aircraft restrictions; and (4) a comparison of the costs and benefits of the alternative measures to the costs and benefits of the proposed restriction." 49 U.S.C. § 47524(b).⁴⁷

While Section 47524(b) includes neither a requirement that the FAA approve a proposed

⁴⁵The relevant grant assurance in this decision is that the airport would be available for public use on reasonable conditions. In light of AAS' failure to appeal from the Hearing Officer's determination that NAA's Stage 2 was not discriminatory, the grant assurance prohibiting discrimination will not be discussed further.

⁴⁶ Section 47107(a)(1) provides: "The Administrator may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Administrator, that (1) the airport will be available for public use on reasonable conditions and without unjust discrimination." 49 U.S.C. § 47107(a)(1).

⁴⁷ This is both a procedural and substantive requirement. As part of the notice and comment process, the airport proprietor must do a substantive cost and benefit analysis of the various alternatives and include a discussion of that analysis in the publication.

Stage 2 aircraft restriction nor any criteria for FAA approval, nevertheless it is clear from the extensive justifications required that Congress did not intend that such access restrictions would be easily obtained.

In contrast to Section 47524(b), Section 47524(c) sets forth criteria for approval of a Stage 3 aircraft access restriction by the Administrator. One criterion for approval of a proposed Stage 3 access restriction is the requirement – similar to Grant Assurance No. 22 – that the restriction must be “reasonable, nonarbitrary, and nondiscriminatory.” 49 U.S.C. § 47524(c)(2)(A).

To understand the differences between Section 47524(b) and (c), it is necessary to look at 49 U.S.C. § 47525. In Section 47525, Congress directed the Administrator to “conduct a study and *decide on* the application of section 47524(a)-(d) ... to airport noise and access restrictions on the operation of stage 2 aircraft with a maximum weight of not more than 75,000 pounds.” 49 U.S.C. § 47525 (emphasis added). As with all enabling legislation, Congress provided the broad outline and left to the FAA the task of providing the specifics. Here, FAA, after the required study, promulgated Part 161. While Part 161 covers the range of noise and access restrictions and their requirements, the preamble to the final rule also specifically noted that ANCA does not grant airport operators any new authority and that the FAA retained, through the operation of ANCA’s savings provision, its authority to challenge access restrictions that are discriminatory or unreasonable, or that impose an undue burden on interstate commerce. 56 Fed. Reg. 48661, 48662 (September 25, 1991). Thus, FAA’s decision, under Section 47525, was to continue the requirement that airport operators seeking to impose Stage 2 access restrictions comply

with grant assurances as well as the new regulatory requirements set forth in Part 161, Subpart C (regarding notice requirements for Stage 2 restrictions.)⁴⁸

In the preamble to Part 161, the FAA explained the relationship between ANCA and Section 47107(a)(1)'s provision regarding written grant assurances. The FAA wrote:

[T]he Act [ANCA] in no way grants airport operators any authority they did not have prior to the Act. Under section 9304(h), 49 U.S.C. App. 2351(h) [now 49 U.S.C. § 47533], preexisting legal limitations on airport operators' authority are not affected except as required by applying the terms of section 9304 [now 49 U.S.C. § 47524]. The courts have consistently recognized FAA's legal authority to challenge airport noise and access restrictions that are discriminatory, unreasonable, or impose an undue burden on interstate commerce. *This authority is expressly preserved and recognized by the Act [ANCA].*

56 Fed. Reg. 48661, 48662 (September 25, 1991) (emphasis added). As the Hearing Officer noted in his decision, AAS has not deviated from that position throughout the handling of the Part 161 process in this case.

The Hearing Officer determined that ANCA did not affect the applicability of the statutory and contractual obligations under Section 47107(a)(1) and Grant Assurance No. 22 to the Stage 2 ban. He wrote:

[I]n the regulatory history of Part 161 and in the FAA's processing of this Stage 2 ban, the FAA's position consistently has been that ANCA would not preclude the agency from examining the ban under the Airport's Grant Agreement. Of course, by itself, consistency does not establish validity of a legal position, but as the agency required to implement ANCA, its interpretation and application of this

⁴⁸ In addition to the grant assurance review process that an airport operator seeking to impose a Stage 2 restriction must undergo, under 14 C.F.R. 161.205, the operator must publish an analysis of the restriction and the alternatives considered. The FAA specifically provided that "[t]he kinds of information set forth in § 161.305 are useful elements of an adequate analysis of a noise or access restriction on Stage 2 aircraft operations." 14 C.F.R. § 161.205(c) (emphasis added). Section 161.305 pertains to the required analysis and conditions for approval of proposed Stage 3 restrictions. This includes a summary of the evidence demonstrating that the proposed restriction is reasonable, nonarbitrary and nondiscriminatory. 14 C.F.R. §§ 161.305(d) and (e)(2)(i). The operator must include "[e]vidence that a current or projected noise or access problem exists, and that the proposed action(s) could relieve the problem, including [a] detailed description of the problem precipitating the proposed restriction with relevant background information on factors contributing to the problem" 14 C.F.R. § 161.305(e)(2)(i)(I)(i).

statute is certainly relevant. Indeed, an agency's interpretation of a statute which it is required to implement is given deference so long as its interpretation is reasonable. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984); Meyer v. Holley, 537 U.S. 280 (2003); Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 466 (D.C. Cir. 1998). Here, the FAA has been charged with carrying out the requirements of ANCA and it consistently advised the public of its interpretation of this statute through the Part 161 rulemaking process. I do not find the FAA's interpretation to be unreasonable, and I find it to be consistent with the purposes of the Statute. Moreover, I concur that there is no clear indication that Congress intended that the "savings clause" in ANCA override the grant assurances. As the courts have noted, the grant agreement is not a simple contract between the airport proprietor and the government, but is "...part of a procedure mandated by Congress to assure federal funds are disbursed in accordance with Congress' will. City and County of San Francisco v. FAA, 942 F.2d 1391, 1396 (9th Cir. 1991.) I am not persuaded that Congress intended for ANCA to override the important obligations of an airport that accepts federal funds.

(Initial Decision at 31-32.)⁴⁹

In its appeal, NAA argues that the initial decision fails to recognize the intention of the statute and regulations to create meaningful distinctions between restrictions on Stage 2 and Stage 3 aircraft.⁵⁰ (NAA's Appeal Brief at 5.) NAA's argument seems to be

⁴⁹ NAA argues that it was error for the Hearing Officer to defer in his initial decision to the self-serving statements by AAS staff and other FAA employees and such statements do not deserve deference under Chevron. The Hearing Officer's statement above about deference to an agency's interpretation, like the Director's in his determination, was perhaps somewhat premature. Under the decisions cited by the Hearing Officer, the courts can be expected to defer to a reasonable agency interpretation. If NAA files a petition for review in a Federal court of appeals, it will be for the court to decide whether it should defer to the interpretation stated in this decision of the relationship of 49 U.S.C. §§ 47107, 47524 and 47533. It is worth mentioning, however, that hearing officers are subject to the agency regarding matters of law and policy because the agency may enforce its policy through the administrative appeals process. Ass'n of Administrative Law Judges v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984).

⁵⁰ Section 47524(c) requires a showing that the proposed Stage 3 restriction is nonarbitrary, as well as reasonable and nondiscriminatory, while Grant Assurance 22 does not include language requiring a showing of nonarbitrariness. Arguably, that is a distinction without a difference. Nevertheless, to the extent that FAA may have, as a practical matter, blurred the distinctions between Stage 2 and Stage 3 restrictions in 49 U.S.C. § 47524(b) and (c), that was a decision that Congress authorized the FAA to make under 49 U.S.C. § 47525 (in which Congress directed the agency to determine how to treat restrictions of Stage 2 aircraft weighing 75,000 pounds or less.) See discussion *supra* pp. 26-27, regarding the direction and mandate that Congress gave the FAA in Section 47525.

that given the differences between Section 47524(b) and Section 47524(c) Congress meant to repeal the reasonableness requirement included in 49 U.S.C. § 47107(a)(1) and Grant Assurance No. 22 regarding Stage 2 restrictions. Carried to its logical conclusion, this argument suggests that Congress intended that local authorities could impose access restrictions on Stage 2 aircraft without limitation, without federal oversight, and without regard to their impact on the national air transportation system so long as they were willing to jump through the required procedural hoops. Surely, that was not the intent of Congress.

Also, to the extent that NAA's argument is based on its inference drawn from the absence of a requirement *in ANCA* itself for FAA approval of a Stage 2 restriction, that argument is not compelling. Repeal by implication is not favored. The Supreme Court has stated that it does not favor repeal by implication unless Congress has "clearly expressed" an intention to do so. *See, e.g., Branch v. Smith*, 123 S. Ct. 1429, 1441 (2003). In *Branch*, the Court noted that it would find implied repeal only "where provisions in two statutes are in 'irreconcilable conflict,' or where the latter act covers the whole substance of the earlier one and 'is clearly intended as a substitute.'" *Id.*, quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

Here Congress did not expressly repeal and it does not appear that it intended to repeal the statutory provisions regarding grant assurances in Section 47107(a) when it passed ANCA. Regarding ANCA's relationship with pre-existing legislation, Section 47533, entitled "relationship to other laws," provides:

Except as provided by section 47524 of this title, this subchapter does not affect –

- (1) law in effect on November 5, 1990, on airport noise or access restrictions by local authorities.

49 U.S.C. § 47533(1). The Airport and Airway Improvement Act, requiring written assurances from recipients of Federal grants, became law in 1982. Section 47524(b) provides that airport proprietors considering a Stage 2 aircraft access restriction must publish a notice containing a specific analysis and provide an opportunity for public comment. By itself, that section does not alter the FAA's responsibility to protect the public interest by enforcing existing grant assurances to ensure that the airport is available for use on reasonable terms to all types, kinds and classes of aircraft. Thus, there is no need to read Section 47524(b) as superceding Section 47107(a)(1). So also, when Section 47524(b) is read together with Section 47524(c), the absence of language requiring that any Stage 2 access restriction be reasonable, nonarbitrary and nondiscriminatory does not compel the conclusion that a similar requirement established in earlier legislation (also seeking to establish some uniformity in noise policy) has been negated.

A look at the predecessor to Section 47533, P.L. 101-508 § 9304(h), supports this interpretation of the savings provision. Congress added Section 47533(1) in 1994 when Congress passed H.R. 758, which restated certain transportation laws, including the ANCA, and enacted them as subtitles II, III and V-X of Title 49 of the United States Code. In restating the original laws, Congress substituted simple language for awkward and obsolete terms, but did not mean to make any substantive change in the laws. House Report No. 103-180 at 3 & 3, *reprinted in* 1994 U.S.C.C.A.N. 818, 818 & 820.

In the original version of the savings clause set forth in Section 9304(h) of P.L. 101-508, Congress wrote as follows:

Except to the extent *required* by the application of the provisions of this section [the provisions regarding Stage 2 and Stage 3 restrictions were included in section

9304], nothing in this subtitle *shall be deemed to eliminate, invalidate, or supersede* –

(1) existing law with respect to airport noise or access restrictions.

(Emphasis added.) Thus, by reference to its original language, it is even more apparent that ANCA did not eliminate, invalidate or supercede AAIA’s provisions regarding written grant assurances because ANCA’s provisions regarding notice, analysis and public comment for Stage 2 aircraft access restrictions did not require it. Without question, the provisions regarding notice, analysis and public comment can be reconciled with AAIA’s requirements for written grant assurances. ANCA can be read as requiring notice, analysis and public comment for proposed Stage 2 aircraft access restrictions in addition to the reasonable conditions requirement of the grant assurance.

Finally, interpreting 49 U.S.C. §§ 47107, 47524 and 47533 as NAA argues would be unreasonable in light of Congress’s goal in passing ANCA of establishing a national noise policy that would stem the propagation of uncoordinated and inconsistent local restrictions that could impede the national air transportation system. 49 U.S.C. § 47521(1) & (2). Congress, as it explained in ANCA, expected that “revenues *controlled* by the United States Government can help resolve noise problems,” while noting that these funds “carry with them a responsibility to the national airport system.” 49 U.S.C. § 47521(6) (emphasis added). Under NAA’s interpretation, the airport operators would be allowed to adopt restrictions – without any FAA review for reasonableness – that may be uncoordinated, inconsistent and contrary to the public interest.

NAA’s interpretation would mean invalidating the grant assurances that local airport operators, like NAA, agreed to when they received grant money under the Airport

Improvement Program. There is no specific language in ANCA nullifying previous grant assurances provided by airport operators when they were awarded AIP funds. Certainly if Congress intended to nullify grant assurances previously given by recipients of AIP funds, Congress would have so stated.⁵¹ Grant assurances are more than just fine print in a legal document; they are contractual obligations undertaken in exchange for receipt of federal money to improve the local airport.

III. Whether the Preponderance of the Evidence Supports the Hearing Officer's Decision that the Stage 2 Ban is Inconsistent with NAA's Statutory and Contractual Obligations to Make its Airport Available for Public Use on Reasonable Terms to All Types, Kinds and Classes of Aeronautical Activities.

The Hearing Officer concluded that the Stage 2 ban was inconsistent with NAA's obligations under Section 47107(a)(1) and Grant Assurance No. 22 to make its airport available for public use upon reasonable conditions to all kinds, types, and classes of aeronautical activity. The Hearing Officer concluded that "[t]he ultimate question is whether the designation of a non-compatibility threshold of DNL 60 dB in this particular situation reflects a noise compatibility problem which supports banning Stage 2 aircraft, and whether the NAA used the proper balance in deciding to implement this access

⁵¹ There is a "deeply rooted" presumption against retroactive legislation. I.N.S. v. St. Cyr, 533 U.S. 289, 371 (2001) quoting Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988). As the Supreme Court has stated, "Retroactive legislation presents problems of unfairness ... because it can deprive citizens of legitimate expectations and upset settled transactions." E. Enters v. Apfel, 524 U.S. 498, 533 (1988), quoting General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992). "Congressional enactments ... will not be construed to have retroactive effect unless their language requires this result." I.N.S. v. St. Cyr at 371, quoting Bowen v. Georgetown Univ. Hospital, 488 U.S. at 208.

restriction.”⁵² The Hearing Officer resolved this issue by finding that: 1) the selection of the DNL 60 dB contour was not justified by an existing noncompatible land use problem; and 2) NAA’s failure to consider a combination of easements, land acquisition and insulation supports a finding that it did not use a balanced approach.⁵³ (Initial Decision at 48, 51.) NAA has appealed from these findings. This decision affirms the Hearing Officer’s finding that the Stage 2 ban was not reasonable.

⁵² The Director explained that under the FAA’s interpretation of Section 47107(a)(1)’s “available for public use on reasonable conditions,” an airport use restriction for noise reduction purposes must “(1) be justified by an existing noncompatible land use problem; (2) be effective in addressing the identified problem and (3) reflect a balanced approach to addressing the identified problem that fairly considers both local and Federal interests.” (DD at 56.) He explained that this interpretation is based on ASNA, Part 150 and FAA Order No. 5190.6A.

NAA argues on appeal that the “balanced approach” aspect of the Director’s “interpretation” actually constituted a new substantive rule that could only be adopted through formal notice and comment rulemaking under the Administrative Procedure Act. NAA argued that when an agency provides guidance on a broad and general term, it must use formal rulemaking. “Reasonable,” NAA argues, is just such a broad and general term, so that an agency interpretation of that term requires notice and comment rulemaking. (Post-Hearing Brief of City of Naples, at 47-48.) NAA argues that it was error for the Hearing Officer to fail to decide whether the Director’s Determination was invalid because it was based upon an interpretation that should have been issued as a substantive rule pursuant to Section 553 of the APA. The Hearing Officer held in his decision that the “issue presented by the NAA goes directly to the validity of the Director’s Determination and is beyond the scope of the issues assigned to me to address [by the FAA Deputy Chief Counsel]. (Initial Decision at 11, n. 44.)

I agree with the Hearing Officer that the validity of the Director’s Determination was not before the Hearing Officer. Moreover, at this juncture in the proceedings, I am not reviewing the Director’s Determination but am considering it only as part of the voluminous record of these proceedings and as one presentation of the views of AAS in this matter. I am not obligated to defer to the views of the employees in my organization. It would be for a Federal court of appeals to decide whether any interpretation presented in my decision is an impermissible substantive rule that should have been promulgated through notice and comment rulemaking (prior to the events leading to this case), rather than through adjudication.

Finally, in light of my decision that a noncompatible land use problem did not exist, I do not have to reach the question of whether NAA took a “balanced approach” to relieve this problem. Hence, there is no reason to decide whether FAA should have issued a regulation through the notice and comment rulemaking process regarding the “balanced approach” prong of the test for reasonableness.

⁵³ The Hearing Officer acknowledged that in light of his finding that a noncompatible land use problem did not exist, he did not have to determine whether the Stage 2 ban reflected a balanced approach.

A. The Hearing Officer's Decision

The Hearing Officer recognized that local governments may limit *residential land* use within the DNL 60 dB contour. He noted, however, that the FAA nonetheless must review a proposed *aircraft access* restriction, based upon a local land use restriction within the DNL 60 dB contour, to see if the access restriction is compatible with the airport operator's obligations under the grant assurances – including the obligation to make an airport available for public use under reasonable conditions. He noted that “the FAA has the obligation to monitor compliance with the grant assurances and to maintain the efficiency and capacity of the national air transportation system.” (Initial Decision at 39.) While, as he noted, an access restriction based upon the selection of a contour below DNL 65 dB is not *per se* a violation, the FAA must evaluate such a restriction to see if it is consistent with the airport operator's grant assurances. (*Id.*)

In evaluating the reasonableness of the Stage 2 ban, the Hearing Officer examined: 1) whether the City of Naples and Collier County's zoning ordinances prohibited residential land development within the DNL 60 dB contour; and 2) whether the City of Naples and Collier County allowed residential development in the DNL 60 dB contour. The Hearing Officer concluded that the City of Naples and Collier County did not approve any residential land development in the DNL 60 dB contour after NAA announced its Part 161 Study, but he also found that neither jurisdiction passed land use ordinances that “unequivocally prohibited such development.” (Initial Decision at 43.) He considered whether NAA faced any actual or potential liability due to excessive aircraft noise in the DNL 60 dB contour and concluded that it did not. He characterized NAA's concerns about potential liability as “purely speculative.” (*Id.* at 44.) He rejected

NAA's claims that the area within the DNL 60 dB contour around the airport is "uniquely quiet or substantially different from communities in other small but growing cities in the South or elsewhere." (*Id.* at 45.) The Hearing Officer also found that the complaint data submitted by NAA neither constitutes reliable evidence of a non-compatible land use nor does it support the reasonableness of the Stage 2 ban. In light of these findings, the Hearing Officer held that the Stage 2 jet ban is not justified by an existing non-compatible land use problem and, as a result, implementation of a Stage 2 access restriction was not justified. (*Id.* at 48.)

B. NAA's Appeal

NAA argues that the Hearing Officer erred when he found that AAS met its burden of proving that the Stage 2 ban was inconsistent with NAA's statutory and contractual obligations. NAA argues that the Hearing Officer was in error because the preponderance of the evidence demonstrates that the Stage 2 ban is reasonable by any measure and, specifically, is consistent with the requirements of FAA Order No. 5190.6A. (NAA's Appeal Brief at 6, Point of Error # 4.)⁵⁴

⁵⁴ NAA also argues in this regard that the Hearing Officer should have treated the Federal district court's decision in National Business Aviation Association v. NAA as reliable, probative and substantial evidence concerning the reasonableness of the Stage 2 ban. This argument is rejected. As discussed previously, the FAA is not bound by the findings of the Federal district court in that case under principles of *res judicata*, collateral estoppel or comity. Furthermore, the court, in determining whether the ban satisfied the reasonableness requirement of the Commerce Clause, was persuaded that the ban was reasonable in part because it concluded that NAA could consider complaints when deciding to impose the ban. National Business Aviation Association v. NAA, 162 F. Supp. 2d at 1353. In the case before me, the question is whether the ban satisfies Grant Assurance No. 22, in which NAA agreed to make its airport available on reasonable terms to all types, kinds and classes of aeronautical activities. As the Hearing Officer found in this case, complaint data is subjective and unreliable. Moreover, most of the complaints came from residents outside of the DNL 60 dB contour. (Initial Decision at 47.) Accordingly, the complaint data does not support NAA's determination that a noncompatible land use problem existed within the DNL 60 dB contour and therefore, the ban does not satisfy Grant Assurance No. 22's requirement that the airport be available on reasonable terms to all types, kinds and classes of aeronautical activities.

It is provided in Section 4.8(f)(1) of FAA Order No. 5190.6A that an FAA employee should only approve a proposed airport access restriction if it is “reasonably consistent with reducing noncompatibility of land uses around the airport.” FAA Order No. 5190.6A, Section 4.8(f)(1).⁵⁵ The Hearing Officer’s determination that the Stage 2 ban was not justified by an actual noncompatible land use problem addresses this criterion. If there is no actual problem, then there are no noncompatible uses to reduce.

1. Local Government Actions

NAA argues that the Hearing Officer should have found that the existence of residents exposed to noise in excess of DNL 60 dB constitutes a land use compatibility problem under Federal law. NAA argues that the Hearing Officer should have deferred to local authorities’ determinations regarding land use compatibility, and that he failed to cite reliable, probative or substantial evidence to support his finding that the City and County actions did not establish the existence of a land use compatibility problem (NAA’s Appeal Brief at 6-7, Point of Error # 5.) This argument is rejected.

While the FAA determined that residential land use is normally compatible with noise levels below DNL 65 dB for the purpose of preparing noise exposure maps, the FAA recognizes that other delineations may be appropriate depending upon local circumstances and that “[t]he responsibility for determining the acceptable and permissible land uses and the relationship between specific properties and specific noise contours rests with the local authorities.” (Part 150, Appendix A, Sec. A150.101(d)). The FAA noted in the preamble to Part 161 that “Part 150 permits, for *reasonable circumstances*, a degree of flexibility in determining a study area and the compatibility of land uses to noise.” 56 Fed. Reg. 48661, 48669 (September 25, 1991) (emphasis added.

⁵⁵ This requirement is consistent with 14 C.F.R. §§ 150.33(a) and 150.35(b)(1).

Part 150, however, does not require the FAA to find that an airport access restriction is consistent with Grant Assurance No. 22 merely because the airport proprietor tied the restriction to a local government policy that residential use is incompatible with noise levels below DNL 65 dB. Local governments and the FAA have different obligations and authority. Local governments may regulate local land use. It is the FAA's responsibility, in contrast, to protect and promote the public interest in the safety and efficiency of the national air transportation system. One way that the FAA achieves this goal is by monitoring airport operators' compliance with the assurances that they gave when they accepted AIP funds.

The Hearing Officer correctly noted that "there is a difference between local land use efforts which do not restrict aircraft, and access restrictions which do and which must be evaluated under aviation statutes and regulations and in particular, must be evaluated under the reasonableness standard set forth in Assurance 22(a)." (Initial Decision at 39.) ASNA permits airport operators to take noise mitigation steps that would not affect the accessibility of the airport by all types, kinds, and classes of aircraft. For example, under ASNA, the operator can construct noise barriers, install acoustical shielding, and acquire land, easements, air rights and development rights to mitigate the effects of noise. 49 U.S.C. § 47504(a). The FAA does not have to examine such measures to see if they run afoul of Grant Assurance No. 22 because they do not affect airport access by different types, kinds and classes of aircraft. In contrast, access restrictions must be evaluated under the grant assurances, in particular Grant Assurance No. 22.⁵⁶ If an airport could designate any noncompatibility threshold simply based on local government

⁵⁶ (Bennett Direct at 16.).

determinations without regard for Grant Assurance No. 22, it “could designate noncompatibility thresholds of 60, 55, or lower, effectively closing airports and severely crippling the nation’s air transportation system.” (Initial Decision at 39.)

Hence, the Hearing Officer correctly decided that he was not obligated to defer to the determinations of the local jurisdictions regarding noise compatibility.

The Hearing Officer considered the actions taken by the local jurisdictions to see whether they justified the Stage 2 ban. He held that while neither the City of Naples nor Collier County had “unequivocally prohibited” residential development in the DNL 60 dB contour,⁵⁷ the City and the County did not approve any residential land development within the DNL 60 dB contour after NAA announced its Part 161 Study. (*Id.* These local ordinances and other land use actions taken by the local government bodies, however, do not establish that a land use compatibility problem exists in the DNL 60 dB contour.

In explaining the justification for the determination to make DNL 60 dB the threshold level, the Mayor of the City of Naples explained that the DNL 60 dB and 65 dB contours were “physically so close together that it did not make sense to use the higher noise threshold as adequate protection for the community in light of the narrow separation between the contour lines.” (MacKenzie Direct at 7.) The decision, she said, was also prompted by concern that the City needed to be “proactive to protect against

⁵⁷ NAA acknowledged in its post-hearing brief that the City and County laws did not include an outright ban on residential development within the DNL 60 dB contour, claiming that flexibility was needed and that “there are sound legal reasons why land use laws are not written in such stark terms.” (NAA’s Post-Hearing Brief at 28.)

incompatible land use encroachment.” (*Id.*)⁵⁸ The City’s determination that it should develop a buffer zone based on the DNL 60 dB threshold does not mean that an actual noncompatible land use problem existed in the DNL 60 dB contour, justifying an aircraft access restriction. The local agencies instituted these land use planning efforts to prevent a future problem due to development too close to the DNL 65 dB contour.⁵⁹

2. Liability from Noise-Related Litigation

NAA challenges the Hearing Officer’s determination that noise-related liability is a factor in deciding whether a land use compatibility problem exists. (NAA’s Appeal Brief at 7, Point of Error # 6.) Its argument is not compelling. The Hearing Officer held that this is a “legitimate factor” to consider. He did not hold that it was imperative for an airport operator to demonstrate that it faced actual or a substantial risk of potential

⁵⁸ She also stated vaguely that “through input from residents, it is clear the community is sensitive to noise greater than 60 dB DNL.” (MacKenzie Direct at 7.)

⁵⁹ The FAA approved of Naples Airport’s 1997 Noise Compatibility Plan update identifying the DNL 60 dB contour because FAA recognized the reasonableness of creating a buffer zone around the DNL 65 dB contour through the implementation of local land use planning measures. *See supra* p.13. Victoria Catlett, an FAA Environmental Specialist, explained that in the 1997 update, NAA adopted the Part 150 DNL 65 dB noise contour as the threshold of incompatibility for residential uses, but recommended that for *zoning and land use planning* purposes, the same standards as Part 150 recommends for the DNL 65 dB noise contour should be applied in the DNL 60 dB contour. NAA had made this recommendation because it saw a need for a buffer to ensure that residential and noise sensitive uses were not developed too close to the airport. Catlett explained:

This is a preventive measure; *i.e.*, no new noise sensitive development would be allowed in the DNL 60 dB. In fact, use of the DNL 60 dB contour to define the limits of the buffer area affirms that the significant noise threshold is DNL 65 dB; the creation of a buffer assumes that the DNL 65 dB contour may expand at some point in the future, due to increased operations, and prevents development in the expansion area in times when the contours are relatively close to the airport.

The buffer is intended only to define that area that will be protected from development, to avoid future exposure at the DNL 65 dB level. The buffer itself is not in any way intended to protect residents to noise levels below DNL 65 dB.

(Catlett Rebuttal at 1-2.)

See also supra fn.24 (regarding Part 150 Study for the Revised Compatibility Program for 1996.)

liability from noise-related litigation. If NAA demonstrated actual or substantial risk of potential liability, that risk might have justified the ban. Absence of such proof would not defeat the ban, if other compelling evidence of its reasonableness existed.

NAA argues that the Hearing Officer should not have substituted his judgment for that of the airport officials regarding NAA's risk of liability. (NAA's Appeal Brief at 7, Point of Error # 6.) Once the Hearing Officer decided that risk of liability was a legitimate factor to consider, however, it was logical for him and within his authority to examine the basis for any concerns that NAA had regarding its exposure to liability.⁶⁰

NAA takes issue with the Hearing Officer's finding that it was not exposed to noise-related liability and that its concerns about liability were purely speculative. NAA argues that this finding was not supported by reliable, probative and substantial evidence. (NAA Appeal Brief at 7-8, Point of Error # 7.) The Hearing Officer's decision on this issue is affirmed because the evidence in the record is insufficient to support NAA's concerns about liability arising from noncompatible uses in the DNL 60 dB contour.

NAA acknowledged that no suits related to airport noise liability have been filed against it. (DD, Item 2, Attachment 15, at 11.) NAA wrote that "its action nevertheless was based upon identifiable and credible threats of suit that cannot be discounted, in light of settlements and judgments regarding other airports around the country." *Id.*

⁶⁰ In arguing that the Hearing Officer should have deferred to the local jurisdiction's assessment of its liability, NAA relies on Santa Monica Airport Ass'n v. Santa Monica, in which the court noted that the city "should be allowed to define the threshold of its liability." Santa Monica Airport Ass'n v. Santa Monica, 659 F.2d 100, 104 n.5 (9th Cir. 1981). (NAA's Post Hearing Brief at 13.) The court, however, was not examining whether the City had complied with Grant Assurance No. 22, but was explaining that the City had to consider the many types of litigation to which it might be exposed.

The Hearing Officer wrote that NAA Commissioner Eric West's concerns regarding liability were not persuasive and lacked specificity and corroboration. (Initial Decision at 44.) This is an apt characterization of West's vague written statement that prior to the implementation of the Stage 2 ban, his apprehensions regarding NAA's potential liability for noise damages or nuisance had increased. (West Direct at 2-3.) The only actual threat that West described came from a "residential resort complex" within the DNL 60 dB contour immediately southeast of the airport. (*Id.* at 3.) At the hearing, he testified that this residential resort complex was the Rock Creek Campgrounds, which is a park for recreational vehicles. (Tr. 524.)

There was insufficient evidence, however, that the Rock Creek Campground might prevail if it sued NAA for inverse condemnation. The campground, in other words, may have threatened to sue for inverse condemnation,⁶¹ but that does not mean necessarily that NAA faces a credible risk of liability. In Florida, in an action for inverse condemnation, the owners of property in the vicinity of an airport must demonstrate substantial – not just consequential – damage that deprives them of the enjoyment and use of their properties to prove that government action has resulted in a taking.

Hillsborough County Aviation Auth. v. Benitez, 200 So. 2d 194 (Fla. Dist. Ct. App.) *cert. denied*, 204 So. 2d 328 (Fla. 1967). To prove that the governmental body that owns a nearby airport has taken an avigational easement over a nearby property as a result of aircraft noise without compensating the property owners, the owners must demonstrate either (1) that aircraft invade the super adjacent airspace causing a direct and immediate interference with the use of their land, or (2) that the property owners have suffered a

⁶¹ (DD, Item 2, Attachment 15 at 13.)

substantial ouster and deprivation of all beneficial use of their property. Fields v. Sarasota-Manatee Airport Authority, 512 So. 2d 961, 963 (Fla. Dist. App. 1987), *cert. denied*, 520 So. 2d 584 (Fla. 1988). Under both theories, the plaintiffs must prove a substantial adverse impact upon the market value of their land. (*Id.*) If the property owners can only prove that there has been a “decreased increase” in value – the property value has increased but perhaps not as much as it would have if the airport was not located nearby – then plaintiffs did not meet their burden of proof. (*Id.* at 965.)

NAA presented no information about the value of the Rock Creek Campground or whether the property value had declined. The record does not contain evidence regarding any claims of lost enjoyment within the small, undeveloped portion of the campground that remained within the DNL 60 dB contour after NAA implemented non-restrictive noise abatement measures.⁶²

West also expressed concern about liability because in the immediate proximity of the airport there are expensive homes with interior spaces designed to open on to large outdoor lanai, pools, gardens and other recreational spaces, as well as multi-story screened-in rooms for all-season use. (West Direct at 3.) These expensive homes are located southwest of the airport, and most of them are *outside* of the DNL 60 dB contour. (Tr. 524.) The Mayor explained that substantial redevelopment is in progress in this area southwest of the airport and that the property values in this area have soared. (Tr. 541.) Since this is also the area from which most of the complaints have been made, the complaints in themselves do not indicate that there is a problem that must be addressed in the DNL 60 dB contour. Also, it is questionable whether the residents would prevail in a

⁶² Due to the non-restrictive measures that NAA has implemented, all but the extreme northeast corner of the campground property has been removed from the DNL 60 dB contour. (Soliday Rebuttal at 11.)

suit for inverse condemnation because of the increase in property values and the desirability of this location, as revealed by the redevelopment boom.

West also was concerned about liability, in part, because of the community's expressions of opposition against the existence of the airport. (West Direct at 1.) He also explained that the community's perceptions of the airport have improved dramatically in the last 5 years because of the NAA's noise abatement actions. (Tr. 530.) All of this 5-year improvement cannot be attributed to the Stage 2 ban because NAA did not begin to enforce the ban until March 2002.

3. Uniquely Quiet

The Hearing Officer held that the area within the DNL 60 dB contour is not unusually peaceful and tranquil, and as a result, the local ambience does not justify the Stage 2 ban. He wrote that "the evidence does not support the position that the portions of the City of Naples or Collier County within the DNL 60 dB contour around APF [Naples Airport] are uniquely quiet or substantially different from communities in other small but growing cities in the South or elsewhere." (Initial Decision at 45.) NAA argues on appeal that the Hearing Officer's conclusions on this issue were in error and not supported by the preponderance of the reliable, probative and substantial evidence.

Preliminarily, NAA appears to argue that the Hearing Officer should not have considered this issue. NAA argues that the Hearing Officer did not cite any authority for the proposition that NAA was required to establish that the area in the contour was "uniquely quiet," or at least, that it would be uniquely quiet without airport-related noise. (NAA's Appeal Brief at 8, Point of Error # 8.) NAA, however, mischaracterizes the Hearing Officer's decision. The Hearing Officer did not hold that NAA had to

demonstrate that the area within the DNL 60 dB contour was unusually quiet. On the contrary, he held that this factor is relevant to the inquiry regarding the reasonableness of the locally-defined standard of noncompatibility. (Initial Decision at 45.)

The Hearing Officer concluded that the evidence did not support a finding that the areas around the airport are uniquely quiet or substantially different from communities in other small but growing cities in the South or elsewhere. There was ample evidence to support his description of this area as a suburban environment and that the area southwest of the airport has a fair degree of congestion. For example, regarding the pre-Stage 2 ban DNL 60 dB contour, NAA Executive Director Soliday testified that the Beau Mer apartments are located at the fairly busy intersection of State Highways 41 and 45. (Tr. 393.) Mariner's Cove Condos are located off of Goodlette-Frank Road, a six-lane road with a "fair amount of highway traffic." (Tr. 393-394.) The Naples Bay community is just south of Highway 41, where "highway traffic. . . can be counted on." (Tr. 395.) Soliday testified that there are restaurants, stores, and tourist attractions in this area and slightly further southwest. (Tr. 396.)

NAA argues that "the Hearing Officer's conclusions regarding the level of community noise and the nature of the environment in the vicinity of the Airport was not based on any reliable, probative and substantial evidence but rather the mere inference § apparently drawn from the fact that . . . some residents live in multi-family dwellings and near multi-lane roads." (NAA Appeal Brief at 8.) The Hearing Officer's inference, however, that the local environment was not uniquely quiet was quite reasonable given the evidence of multiple unit housing, multi-lane roads, traffic, tourism and commerce.

4. Conclusion

In light of the above, the preponderance of the evidence supports the Hearing Officer's determination that NAA's decision to base the Stage 2 ban on a DNL 60 dB threshold was not reasonable. The evidence does not show that there was a noncompatible land use problem in the DNL 60 dB contour that would justify a Stage 2 ban based on that threshold. As a result, the Hearing Officer's determination that the Stage 2 ban was contrary to Section 47107(a)(1) and Grant Assurance No. 22 is affirmed.

In light of this conclusion, there is no need to review the Hearing Officer's decision that the Stage 2 ban did not represent a balanced approach to mitigating an existing noncompatibility problem.

IV. Whether the Hearing Officer Applied the Burden of Proof to the Correct Party

The basic burden of proof in this proceeding was on the agency. 14 C.F.R. § 16.229(a). There are only two exceptions to the general rule that the agency bears the burden of proof. The first is for the proponent of a motion, request, or order. 14 C.F.R. § 16.229(b). The second is for a party asserting an affirmative defense. 14 C.F.R. § 16.229(c).

In the initial decision, the Hearing Officer correctly stated the general rule that the burden of proof was on the agency. (Initial Decision at 11.) Nevertheless, NAA argues without any explanation on page 9 of its Appeal Brief that the Hearing Officer reversed the burden of proof concerning the following three findings:

Finding 1 – That the Federal district court decision did not bind the FAA;

Finding 3 – That the Stage 2 ban was inconsistent with NAA's obligation to make its airport available for public use on reasonable terms; and

Finding 4 – That ANCA does not affect the applicability of the grant assurances.

Finding 1 (determining whether the district court decision binds the FAA) and Finding 4 (determining whether a statute supercedes the grant assurances) both involve questions of law, not of fact. Questions of law do not lend themselves to a burden-of-proof analysis, as AAS correctly argues on page 22 of its reply brief. According to BLACK’S LAW DICTIONARY (5th ed. 1979), “burden of proof is the necessity or duty of affirmatively proving a *fact* or *facts* in dispute.” (Emphasis added). Thus, a burden-of-proof analysis does not apply to Findings 1 and 4, because they involve matters of law rather than questions of fact.

In contrast, Finding 3 – that the Stage 2 ban was inconsistent with NAA’s obligation to make its airport available for public use on reasonable terms to all types, kinds, and classes of aeronautical activities – did require the resolution of questions of fact. The Hearing Officer, however, indicated several times that he was placing the burden of proof firmly on the agency.

He stated that “deference [to an agency’s interpretation of a statute that it has authority to implement] . . . *does not relieve an agency from the burden of establishing that . . . its application to a particular set of facts is correct.*” (Initial Decision at 37; emphasis added). He further stated that “there is nothing in the pertinent regulations or statutes which confers the FAA with the authority to reject an access restriction *unless it can demonstrate* that it violates the contractual obligation that the airport has pursuant to 49 U.S.C. § 47107.” (*Id.* at 39; emphasis added).

NAA argues on page 5 of its post-hearing brief (which NAA incorporated by reference into NAA’s appeal brief), that AAS structured its case as if NAA had the

burden of proof. The issue, however, is whether the Hearing Officer applied the burden of proof to the correct party.

NAA argues that on the issue of liability, the Hearing Officer effectively imposed the burden of proof on it, contrary to 14 C.F.R. § 16.229, by finding that the evidence presented by the Airport Authority was unpersuasive but not requiring AAS to introduce any contradictory evidence. (NAA's Appeal Brief at 7, Point of Error # 7). Under Part 150, all land uses, including residential land use, are compatible with noise levels at DNL 65 dB or less. In this case, NAA argues, it is justified in implementing a ban on all Stage 2 aircraft because of locally based determinations that residential land use is incompatible with noise levels within the DNL 60 dB contour. The burden of proving that residential land use is incompatible with noise levels starting at the DNL 60 dB threshold is on NAA because that is, in essence, an affirmative defense. Under 14 C.F.R. § 16.229(c), "a party who has asserted an affirmative defense has the burden of proving the affirmative defense." If NAA could show that it faces a substantial risk of liability arising from within the DNL 60 dB contour, that would tend to show that the Stage 2 ban was reasonable under Section 47107(a)(1) and Grant Assurance No. 22.

V. Whether the Director Issued His Determination Late

NAA argues that the Director issued his determination 11 months late. According to NAA, under 14 C.F.R. § 16.31, the Director should have issued his determination within 120 days. (NAA's Appeal Brief at 9, Point of Error #11.) NAA's argument must be rejected because Section 16.31's 120-day requirement does not apply to cases like this one that arise from an agency action initiated by the FAA under Section 16.101.

Moreover, even if the 120-day requirement did apply, the Rules of Practice do not specify

a consequence for a late-issued determination by the Director. As a result, even if the Director issued his determination late, that fact alone would not invalidate the determination.

Section 16.31, entitled “Director’s determinations after investigations,” appears in 14 C.F.R. Part 16, Subpart C. Subpart C provides special rules applicable to actions in which a person directly and substantially affected by an alleged noncompliance files a complaint. 14 C.F.R. § 16.23(a). The FAA will launch an investigation if, upon review of the pleadings filed under Section 16.23, the FAA determines that there are reasons for further investigation 14 C.F.R. § 16.29(a). Under Section 16.31(a), the Director will render an initial determination after consideration of the pleadings and other information within 120 days of the date of the last pleading specified in Section 16.23.

This case did not arise from a complaint as described in Section 16.23. Instead, the FAA initiated this case under Part 16, Subpart D. In such proceedings, initiated by the FAA, “[i]f the matters addressed in the FAA notices are not resolved informally, the FAA may issue a Director’s determination under § 16.31.” 14 C.F.R. § 16.105. However, Section 16.31’s requirement that the Director issue a determination within 120 days of the date *on which the last pleading* was due cannot apply when the Director issues a determination in a case initiated through agency action because in such a case, there is no complaint, answer or other pleading.

Moreover, assuming *arguendo* that Section 16.31’s 120-day time frame applied in this case, Section 16.31 does not specify any consequence if the Director fails to meet the deadline for issuing his determination. An official who fails to comply with a statutory time limit does not lose jurisdiction unless the statute expressly states loss of jurisdiction

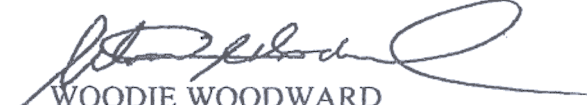
as a consequence for failing to comply. McCarthy v. Busey, 954 F.2d 1147, 1152 (6th Cir. 1992). While the instant case involves a regulatory, rather than a statutory, time limit, it is reasonable to apply the same rule. Assuming *arguendo* that the 120-day time frame applied in this case, the Director would not have lost jurisdiction because Section 16.31 does not provide any such consequence if the determination is late. Consequently, it is not necessary to decide whether the Director's Determination, if it was indeed late, would render the initial decision invalid or warrant its reversal.

VI. NAA's Other Arguments

All arguments not specifically addressed in this decision have been considered and are rejected.⁶³

CONCLUSION

In light of the foregoing, NAA's appeal is denied, and the Hearing Officer's initial decision is affirmed.

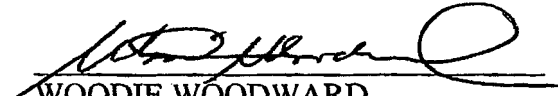

WOODIE WOODWARD
Associate Administrator for Airports

⁶³ NAA's appeal brief includes vague arguments that are not supported by record citations.

ORDER

It is ordered, pursuant to the authority set forth in 49 U.S.C. § 47106(d), that until Naples Airport Authority (NAA) rescinds or takes formal action discontinuing the enforcement of the ban on Stage 2 aircraft operations at Naples Municipal Airport, the Federal Aviation Administration (FAA) shall withhold approval of:

- any application submitted by NAA for amounts apportioned under 49 U.S.C. § 47114(c) and (e); and
- any application submitted by NAA for discretionary grants authorized under 49 U.S.C. § 47115.⁶⁴


WOODIE WOODWARD
Associate Administrator for Airports

Issued this 25th day of August, 2003.

⁶⁴ A person may seek judicial review in a United States Court of Appeals from a final agency decision and order of the Associate Administrator. See 14 C.F.R. § 16.247 for information regarding appeal rights.

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